IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 66 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHIMANBHAI GORDHANBHAI BARIYA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 66 of 1996

MS SADHANA SAGAR for Petitioner No. 1

MR HM PRACHHAK Ld. APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 15/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. The appellant-accused Chimanbhai Gordhanbhai Baria has challenged in this appeal the impugned judgment and order dated 9.1.1996 passed by the ld. Sessions Judge, Vadodara, in Sessions Case No. 20/1995 convicting the appellant-accused for the major offence under sec. 302 IPC, under sec. 504 IPC and under sec. 135 of Bombay Police Act and sentenced to suffer life imprisonment for the offence under sec. 302 IPC. However, no separate sentences were ordered for the offences under sec. 504 IPC and under sec. 135 of the Bombay Police Act.

2. The appellant-accused was represented before the trial court by an appointed advocate Shri R.A. Sharma, and in this appeal, initially learned advocate Shri P.K. Soni was appointed. However, when the matter was placed before this Court on 12.1.2004 Mr. Soni was not able to appear, therefore, we had orally asked Ms. Sadhana Sagar to appear for the appellant-accused. Accordingly, she has addressed this court in this appeal today.

3. As per the prosecution case, on 15.11.1994 at about 7.00 P.M., appellant-accused Chimanbhai gave filthy abuses to his wife deceased Shantaben, who was sleeping in the house in Zupadpatti, Near Maruti Nagar, Kareli Baug, Vadodara and killed her by giving Axe blows on her head as well as on her back by keeping false suspicion about her character. Thereby, appellant-accused has committed an offence under sec. 302, 504 IPC and under sec. 135 of Bombay Police Act. PSI Shri Sisodiya and Head Constable Shri Naranbhai were present on duty at Kareli Baug Police Station. At that time, PSO Shri Naranbhai received telephonic Vardhi, Exh. 27, that because of the quarrel, one woman was seriously assaulted by her husband in the Zupadpatti of Maruti Nagar area, behind Arya Kanya Vidhyalaya. Thereupon, PSI Shri Sisodiya went to the place of incident in rickshaw and saw deceased Shantaben lying on the cot with the injury on her head. Thereupon, he called two ladies from the nearby and removed her to SSG Hospital, Vadodara. Shantaben was conscious and an endorsement to that effect was made on Yadi by Dr. Parmar at Exh. 7 and said Yadi was sent by Dr. Parmar to Executive Magistrate for recording of her Dying Declaration. During that time, PSI Shri Sisodiya started to record complaint of Shantaben at about 8.30 P.M. which was over by 8.55 P.M. Below that complaint, he obtained thumb impression of the complainant and below that he put up his signature which

was produced at Exh. 29. Thereafter, the investigation was taken over by P.I. Shri Kanani. After taking over the investigation, P.I. Shri Kanani immediately reached S.S.G. Hospital and enquired from Shantaben. Injury received by Shantaben on her head found to be serious, therefore, he sent PSI Shri Sisodiya to call Executive Magistrate for recording her Dying Declaration. During the investigation, the accused himself came with Axe and surrendered before the police in the police station. After arresting the accused, scene of panchnama was made on the next day morning because of the previous night. Thereafter, he recorded statements of witnesses; Ambalal son of deceased Shantaben and appellant-accused Chimanbhai, Gordhanbhai Shankarbhai, etc. Shantaben died at 1.15 hrs. of midnight, therefore, sec. 302 IPC was added. After completing the investigation, the police submitted charge-sheet before the learned Magistrate, who in turn, committed the case to the Court of Sessions. After the case was committed to the court of Sessions, ld. Sessions Judge framed charge Exh. 1 against the appellant-accused for the offences under sec. 302, 504 IPC and under sec. 135 of Bombay Police Act.

Before the ld. Sessions Judge, the prosecution examined in all 10 witnesses, which includes Ambalal Chimanbhai, son of deceased Shantaben and appellant-accused Chimanbhai as well as Executive Magistrate Maganbhai Bhanabhai Makwana, who stated to have recorded the dying declaration of deceased Shantaben. Dr. Sherbanu Mazizkhan who issued injury certificate of deceased Shantaben was examined at Exh. 9, whereas Dr. Nayan Keshubhai Modi who performed postmortem was examined at Exh. 11. Dr. Naran Punjabhai Parmar, who made endorsement on the yadi that the patient was conscious, examined at exh. 21. Apart from panch witnesses, prosecution has also examined PSI Shri Sisodiya at ex. 28, who recorded the complaint of Shantaben and Investigating Officer Shri Kanani at Exh. 32. In addition to the oral evidence of the aforesaid witnesses, the prosecution has also tried to rely on the documentary evidence like complaint, dying declaration, inquest panchanama, panchanama of scene of offence, FSL report etc. After recording the evidence of prosecution witnesses, the ld. Judge gave an opportunity to the appellant-accused to explain the prosecution witnesses under sec. 313 of the Code of Criminal Procedure. The appellant-accused denied the commission of the offence and not preferred to examined himself on oath and he has not examined any one in his defence. According to the appellant-accused, a false case was filed against him and he had not committed any such offence. However, he

submitted his written reply, wherein also, he contended that he had not committed any offence and he is totally innocent. However, alternatively, it was submitted that if at all the court comes to the conclusion that the offence was committed by him, then the incident in question took place because of the instigation of Shantaben. On the day of incident, he returned from his job of "watchman" to his home. At that time, he had seen his wife talking and doing eye-teasing with one "Sheth". Prior to this also, the appellant-accused was aware about the illicit relation of his wife with the "Sheth". Therefore, he had told the deceased not to keep such relations and also scolded her. When he had seen the deceased having eye-teasing and talking with "Sheth", thereupon, once again he scolded his wife for that. Because of that, his wife lost her temper and told her accused husband that he was impotent and there is nothing in him and she will continue to have relations with "Sheth" and he can do whatever he wants to do. It is because of this only, the accused lost his temper and whatever lying nearby, without seeing it, he took it up and gave blows with it. But he had no such prior intention to kill his wife and the incident in question took place due to grave and sudden provocation of such words uttered by his wife for keeping illicit relations with "Sheth". Thus, it was contended that it would be a case under sec. 304 Part-II or under sec. 304 Part-I IPC and not a case under sec. 302 IPC.

4. Considering the oral as well as documentary evidence led by the prosecution, the ld. Judge was of the opinion that the prosecution proved its case against the accused beyond reasonable doubt that it was an accused alone who killed his wife. He has also came to the conclusion that the accused failed to bring his case either under sec. 304 Part-II or under sec. 304 Part-I IPC, as according to him, there was no grave or sudden provocation, and in fact, the accused committed murder of his wife with predetermination. He, therefore, convicted the accused for the major offence under sec. 302 IPC and sentenced him to suffer life imprisonment. This impugned judgment and order of conviction and sentence passed by the ld. Sessions Judge, Vadodara is challenged in this appeal.

5. At the out set, it may be submitted that having regard to the dying declaration made by the deceased Shantaben before the PSI Shri Sisodiya and her dying declaration recorded by the Executive Magistrate and the evidence of other eye witnesses, including the evidence of Ambalal, son of deceased Shantaben and

appellant-accused Chimanbhai, Ms. Sadhana Sagar conceded that the ld. Sessions Judge has rightly found the appellant-accused guilty for killing his wife. However, on the evidence on record of the case and the defence of the appellant-accused, she submitted that ld. Sessions Judge committed an error in convicting the appellant-accused for the offence under sec. 302 IPC when there was a grave and sudden provocation at the time of incident and the case of the appellant-accused falls under Exception I to sec. 304 IPC, therefore, he could have been convicted for the offence under sec. 304 Part-II or at the most under sec. 304 Part-I. She, therefore, submitted that order of conviction and sentence passed by the ld. Sessions Judge, be modified and appellant-accused be convicted for the offence under sec. 304 Part-II or under sec. 304 Part-I and ordered sentence accordingly. The order of sentence as already undergone be passed as the appellant-accused is in jail since last about 9 years. In support of her contention, Ms. Sagar has drawn our attention to the evidence of Ambalal, PW-6, Exh. 23. Ambalal is son of both, deceased Shantaben and appellant-accused Chimanbhai. Admittedly, he was not present at the time of incident. According to his evidence in chief, when he and his father came for having lunch in the afternoon on the day of incident, at that time, there was a quarrel between his accused father and deceased mother. Therefore, she had not cooked. Because of that, he and his father cooked and had food. Prior to the incident also, quarrels were taking place between his father and mother. His father never like his mother talking with "sheth" of the Bungalow and because of that, quarrels were taking place. On the day of incident, his father had seen his mother talking with "Sheth", which he came to know later on. In his cross-examination, he has stated that he was having love for his mother as well as father. His mother used to go for household work in the Bungalow, whereas his father was going for work as "Watchman". Main cause of quarrel between his father and mother was because of illicit relation of his mother with "Sheth" of Bungalow. He heard that on the day of incident, his mother told his father that he was impotent and she will keep such illicit relations and he (accused) may do whatever he wants to do. Thereupon, his father got excited and in excitement, he committed such an act. He has also pointed out that after committing this act, the accused realized what he did, therefore, on his own, he surrendered himself before the police when his wife deceased Shantaben was alive. Ms. Sagar, therefore, submitted that the act committed by the accused was due to grave and sudden provocation and no man can tolerate

this and any husband having married life of more than 20 years, may do same thing under the given circumstances. She, therefore, submitted that ld. Sessions Judge was absolutely wrong in convicting the accused for the offence under sec. 302 IPC and not under sec. 304 Part-II or under sec. 304 Part-I IPC. From the evidence on record, it is clear that due to grave and sudden provocation, the incident in question had taken place and the case would definitely fall under Exception-I of Sec. 304 IPC. However, submission of Ms. Sagar that case would fall under sec. 304 Part-II cannot be accepted because accused had lost his temper and gave blows on head and the back. Therefore, there was no question that with object, he committed such an offence. Therefore, he, cannot be convicted for the offence under sec. 304 Part-II IPC, as submitted by Ms. Sagar. However, alternative submission is required to be accepted that the case falls under sec. 304 Part-I. We may state that on facts of this case, Shri HM Prachhak ld. APP was also not in a position to support the reasonings assigned by the ld. Sessions Judge for convicting the accused under sec. 302 IPC. We have carefully gone through the reasonings assigned by the ld. Judge in para-43 of his judgment for not accepting the case of the appellant-accused that his case falls under sec. 304 Part-I and not under sec. 304 part-II IPC. The ld. Judge was of the opinion that both, the accused as well as the deceased, belonged to labour class and even if, for the sake of argument, it is believed that the deceased was having illicit relations with some one else, and uttered such words and called impotent, then also, there was no reason for the accused to got excited and committed such a heinous act. The fact that the quarrels were taking place since long because of this type of illicit relation, therefore, it is not possible to believe that due to grave and sudden provocation, the accused committed offence on the day of incident. If there was some substance in the allegation, then it would be at the most, case for getting divorce by the accused, nothing more than that. The ld. Judge also observed that from the facts that the accused has given as many as three blows on the vital part of the deceased Shantaben with predetermination and intention to kill his wife and take the revenge. With due respect to the ld. Judge, we cannot agree with this reasoning. The ld. Judge has not at all considered the most important evidence of none-else, but Ambalal, son of both, appellant-accused as well as deceased Shantaben. On the date of incident also, there was a quarrel between the husband and wife and because of that, she did not cook any food for her husband or her son Ambalal. Therefore, both, father and

son came back to home for lunch, cooked food and had it. Thereafter, son Ambalal left, but in his absent, his father seen his mother talking with "Sheth" and having eye-teasing and when she was prevented then she taunted her husband with such a words that any one would have lost his temper. The ld. Judge himself noticed that both the accused as well as deceased were belonging to the labour class, therefore, they may not go for divorce for this purpose. In any case, it cannot be said that with a predetermination mind and intention, the accused-appellant committed the offence. In the instant case, it appears that the appellant-accused had as many as four children; three married daughters and one son and instead of it, his wife was keeping illicit relations with "Sheth" and in his presence also, if she was talking and eye-teasing with "Sheth" and when he tried to stop his wife from doing so, thereupon, his wife taunting him by calling impotent, then in our considered opinion, there can not be a better case for grave and sudden provocation. In view of the above, we are of the considered opinion that the ld. Judge has rightly come to the conclusion that the appellant -accused had killed his wife on the day of incident, but wrongly found him guilty for the major offence under sec. 302 IPC when his case was definitely falling under sec. 304 Part-I IPC.

6. In view of the above discussion, this appeal is partly allowed and the impugned judgment and order of conviction and sentence passed by the ld. Sessions Judge, Vadodara convicting the appellant-accused for the major offence under sec. 302 IPC is hereby quashed and set aside and the appellant-accused is found guilty for the offence under sec. 304 Part-I IPC and, accordingly, he is convicted for the offence under sec. 304 Part-I IPC.

7. The next question is that what should be the sentence. Jail record of the appellant-accused produced by ld. APP Shri Prachhak shows that appellant-accused has actually undergone sentence of more than 7 years, 10 months and 10 days and he was entitled for set-off of 1 year, 1 month and 24 days while remaining as under-trial prisoner and has also earned remission of two years. In view of this, we are of the considered opinion that it is a fit case where order of sentence as already undergone, be passed.

8. Accordingly, this appeal is partly allowed and the impugned judgment and order of conviction and sentence passed by the ld. Sessions Judge, Vadodara in Sessions Case No. 20/1995 convicting the appellant-accused - Chimanbhai Gordhanbhai Baria for committing murder of his wife- Shantaben for the offence under section 302 IPC and sentenced him to suffer life imprisonment is hereby set aside and the conviction is altered to section 304 Part-I IPC and the aforesaid period of sentence which he has already undergone is ordered as sentence undergone. Rest of the order passed by the ld. Judge remain undisturbed. If he is not required for any other offence, then he may be released, forthwith.

(B.J. SHETHNA, J.)

(J.R. VORA, J.)

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